

AEE already operates at a loss and cannot sustain any reduction in funding. Implementation of the \$250 cap – beginning only six months after the *USF/ICC Transformation Order*’s effective date – is not a phase-in over a reasonable period of time, and it deprives AEE of the ability “to adjust to a new regulatory regime.”³⁹ At a minimum, a two-year delay in implementation of the HCLS cap is justified, and the Bureau should not allow the HCLS cap to be implemented against AEE until action on this Petition is taken. As noted throughout, however, AEE will be unlikely to sustain wireline service if USF support in the future does not replicate the level of support AEE receives today.

E. Implementation Of The \$250 Monthly Cap In A Manner That Will Drive AEE Out Of Business Is Contrary To Many Commission Policies And Objectives, Including Its Obligations To Adopt Policies That Benefit Consumers.

The Commission correctly points out that its “statutory obligation runs to consumers,” and it “must target limited public funds in a way that expands and sustains the availability of mobile broadband services to maximize consumer benefits.”⁴⁰ In this instance, however, the monthly cap will ultimately cause the public to lose the benefit of terrestrial wireline voice service and wireless access that enables mobile broadband, in the entire Adak area. Because

³⁹ *Id.*

⁴⁰ *USF/ICC Transformation Order*, ¶ 1136. *See also id.* (identifying “Maximize broadband availability” as a guiding principle for adopting special access policies related to USF reform, noting that “[t]he objective should be to maximize the number of households that are served by broadband meeting the National Broadband Availability Target.”); *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-51, 09-137, Sixth Broadband Deployment Report, FCC 10-129, ¶ 29 (2010)(stating “[t]he goal of the statute, and the standard against which we measure our progress, is universal broadband availability.”); *see also FCC Creates ‘Connect America Fund’ To Help Extend High-Speed Internet To 18 Million Unserved Americans; Creating Jobs & Increased Consumer Benefits*, News Release (Oct. 27, 2011)(stating “the FCC recognizes the growing importance of mobile broadband” making “it an independent universal service objective for the first time in history.”).

AEE is the only carrier capable of providing the facilities necessary for wireline, wireless, and broadband access, the Commission will undo years of private and public investment and effort undertaken to enable newly-initiated wireline and wireless services and ensure that consumers in this remote area are served. Moreover, the Commission will violate its national goal “to advance broadband availability while preserving the voice and broadband service that exists today.”⁴¹

For all of the foregoing reasons, AEE believes firmly that the Commission could not have intended the devastating consequences that will result from implementation of the \$250 monthly cap to AEE. In view of all that is at stake, the Bureau should act expeditiously to grant AEE’s waiver request.

III. GOOD CAUSE EXISTS AND THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THIS WAIVER REQUEST.

Implementing the \$250 monthly cap, beginning in July, will cause devastating consequences to AEE that will quickly undo the tremendous progress to bring telecommunications, mobile wireless and broadband services to the Adak area. As mentioned previously, unlike other carriers in the nation that may have the option of engaging in some belt-tightening measures, AEE already operates at a loss and will have no choice but to shut down all operations due to its insurmountable operating costs. Because AEE is the linchpin that ultimately makes it possible for comprehensive telecommunications services to operate on Adak Island, if the waiver is not granted: (1) the Adak community will lose voice service and roaming capabilities with no terrestrial alternative, and access to broadband will be completely eliminated; (2) AEE will default on its RUS loans, wasting millions in taxpayer dollars just a few years after such funding was approved; (3) the Adak community’s vital anchor institutions will

⁴¹ *USF/ICC Transformation Order*, n. 438; *see also* Section IV(B), *infra*, for additional Commission policies and objectives that support granting this waiver.

lose access to essential voice and broadband services; (4) critical services, government functions and public safety will be jeopardized; and (5) AEE will become insolvent, causing jobs to be lost and the fragile Adak economy to suffer.

A. Without A Waiver, The Adak Community Will Lose Voice Service And Roaming Capabilities With No Terrestrial Alternative, And All Access To Broadband Will Be Lost.

The immediate reduction in funding in July, followed by additional phased-in reductions, will put AEE out of business by the end of 2013, when AEE's loss is projected to be over \$1.7 million.⁴² Indeed, as noted above, AEE has already laid off four of its employees. Because AEE is the only provider of wireline service, as well as the only provider with the facilities required to provide broadband service and wireless throughout the entire study area, if AEE goes out of business, voice, broadband and roaming access throughout the entire Adak area, including the sea and the Aleutian Wilderness, will be eliminated. This result will more than "create significant or widespread risks"⁴³ that consumers will be left without voice service because there is no question that consumers WILL be left without services.⁴⁴ As already discussed in Section II, *supra*, if AEE is forced to shut down, there will be no local wireline voice service, no long distance service provided to interexchange carriers, no Lifeline support for low-income subscribers, no connection to telemedicine, no school or library programs, no connection to broadband service, and no wireless service throughout the entirety of the Adak area. This is the

⁴² See Financial and Operating Forecast at Exhibit 8.

⁴³ *USF/ICC Transformation Order*, ¶ 522.

⁴⁴ See Information Regarding Lack of Alternative Providers at Exhibit 2.

precise situation the Commission had in mind when describing circumstances under which waiver is justified in its *USF/ICC Transformation Order*.⁴⁵

AEE plays a vital role in providing telecommunications services to Adak, including operating essential facilities that support the communications service offered by all communications carriers in Adak: (1) AEE d/b/a ATU provides wireline service as the ILEC operating in the Adak area; (2) Windy City Cellular, AEE's wireless affiliate, provides wireless service and the only broadband service to Adak. Windy City Cellular's service is the only service that extends into the Aleutian wilderness and maritime locations. Windy City Cellular relies upon AEE's backbone for interconnection; (3) Alaska Wireless provides wireless service to the downtown area made possible by its interconnection agreement with AEE. Alaska Wireless uses AEE's facilities to operate long distance service through AEE's fiber distribution; and (4) AT&T provides roaming service through an interconnection agreement with Windy City Cellular (which interconnects with the AEE network). AT&T also is supposed to serve as the IXC of last resort for Adak, but without the AEE infrastructure, it will not be able to perform this function. Because AEE plays a vital role in the provision of each of these telecommunications services in Adak, if AEE goes out of business there will be a domino effect of service-ending consequences that will leave the entire Adak area without voice, broadband or roaming access.

The importance of the critical facilities AEE provides to wireless carriers is underscored when you consider the essential service provided by Windy City Cellular. Outside of the downtown area, people travel long distances between points throughout the Adak area and are dependent on wireless communications provided by Windy City Cellular for safety. The Adak area includes one of the most important vessel-tracking receiving sites in Alaska, and is part of a

⁴⁵ *USF/ICC Transformation Order*, ¶ 32.

vessel tracking network to aid safe, secure, efficient and environmentally sound maritime operations in Alaska.⁴⁶ Much of Adak Island is part of the Alaska Maritime National Wildlife Refuge. There also are a large number of contractors in Adak in remote areas who provide various critical and governmental services relating to maritime safety, ordinance disposal, environmental remediation, asset evaluation, wildlife preservation, and environmental monitoring. Windy City Cellular provides critical wireless voice service, the only terrestrial alternative in outlying areas, to all of these groups, including the Marine Exchange of Alaska, government researchers working for the USGS Volcano Observatory, the U.S. Fish and Wildlife Service, the Navy, the Adak Community Development Corporation, the Eastern Aleutian Tribes non-profit health organization, subsistence fishermen, and subsistence hunters. All of these groups would be left without any access to terrestrial voice services, including in times of emergency, if AEE shuts down and Windy City Cellular is forced to shut down as a result.⁴⁷ In addition, if AEE is forced to stop operating, there will be no staff on Adak capable of handling technical issues for Alaska Wireless and Windy City Cellular because both companies depend on AEE's staff and facilities to address basic and emergency operational concerns.

The Commission specifically stated in the *USF/ICC Transformation Order* that it would “consider as a factor showings regarding the impact on customers, including roaming customers, if a petitioner is the only provider of CDMA or GSM coverage in the affected area” when evaluating waiver requests.⁴⁸ Here, AEE is the essential wireline provider that makes wireless,

⁴⁶ See Letter from Marine Exchange of Alaska dated March 28, 2012 (“Marine Exchange Letter”) at Attachment A.

⁴⁷ See Section III(B) of the WCC Petition for a full explanation of the public safety services that are enabled by the Windy City Cellular service.

⁴⁸ *USF/ICC Transformation Order*, ¶ 540.

broadband and roaming capabilities possible throughout the entire Adak area. The loss of telecommunications access and roaming capabilities in one of the most severe and climactically volatile areas of the United States would be catastrophic and runs directly counter to the Commission's goal of ensuring telecommunications access available to all.⁴⁹ A waiver would prevent this result and should be granted promptly.

B. Without A Waiver, AEE Will Default On Its RUS Loans, Wasting Millions In Taxpayer Dollars Just Years After Such Funding Was Approved.

Grant of a waiver is further justified because without it, AEE will default on its RUS loan.⁵⁰ AEE is a model example of how USF support and an RUS loan have worked together to successfully turn a remote island with no hope of a modern telecommunications system into an area where essential, life-preserving access to voice and broadband service is possible and, as a result, it is possible to support jobs and a fledgling economy. When AEE made the decision to accept the challenge of providing service to the sparsely populated Adak community, it understood that it could never expect to recover its tremendous investment and operating costs through customer charges. Instead, AEE's decision to build a comprehensive communications infrastructure on Adak was predicated on receiving adequate federal support.

In 2005, AEE submitted a loan package to RUS for over six million dollars in order to replace the telephone system on Adak. To ensure that AEE would have an adequate revenue base to repay the loans, RUS conditioned the loan on AEE receiving immediate USF support from the National Exchange Carrier Association, Inc. ("NECA").⁵¹ Once this condition was met,

⁴⁹ See 47 U.S.C. § 254(b)(3) and (4).

⁵⁰ See *USF/ICC Transformation Order*, ¶ 540 ("[The Commission] will consider whether the specific reforms would cause a provider to default on existing loans and/or become insolvent.").

⁵¹ See RUS Loan Schedule 1 at Exhibit 11.

along with grant of a permanent CPCN by the RCA, RUS loaned AEE \$6,344,450. With these borrowed funds, only made possible by the Commission waiving its rules to allow AEE to receive immediate USF funding, AEE was able to replace the old military switch and the corroded outside plant twisted-pair cables with modern day technology, including a Class 5 Switch, FTTH, DSL, and ONT. These substantial investments for newly-initiated services, costing millions of dollars, have only provided a benefit to Adak for the past few years and will be left to waste in the absence of a waiver.

When financing decisions were made to bring these modern facilities and services to the Adak area, the reliance that AEE and RUS placed on receiving adequate USF support to repay borrowed funds was reasonable given the mandates of the USF program to ensure that consumers in rural and high cost areas receive access to advanced telecommunications service⁵² and that rates remain “just, reasonable, and affordable.”⁵³ In light of the clear objectives of the statute, neither RUS nor AEE could have predicted that the Commission would adopt USF reforms that would slash funding so drastically and immediately that AEE could no longer afford to operate or fulfill its loan obligations.

It seems even the Commission did not predict that application of the \$250 cap would cause carriers to default on their RUS loans. In fact, the Commission claimed to be “confident” that its reforms “will in general not materially impact the ability of these carriers to service their existing debt.”⁵⁴ Instead, the Commission expected that “many borrowers ... will be able to achieve operational efficiencies to reduce operating expenses” to “offset reductions in universal

⁵² 47 U.S.C. § 254(b)(2).

⁵³ *Id.* at § 254(b)(1).

⁵⁴ *USF/ICC Transformation Order*, ¶ 292.

service support.”⁵⁵ Unfortunately, however, in the case of AEE, where USF support comprises 90% of its revenue base, the reduction in funding caused by application of the HCLS cap will force AEE to shut down service and default on its RUS loans by the end of 2013. Given the enormously high, fixed operating costs of providing service in Adak, no amount of operational efficiencies can offset the service-ending reduction in funding that will cause AEE to default on its RUS loans.⁵⁶ Similarly, even if RUS were willing to modify its loan terms, no reasonable modification of the loan terms will allow AEE to meet its loan commitment to RUS given the reduction in AEE’s funding. Put simply, without the requested waiver, AEE, which is already operating at a loss, will have no viable means to make its annual RUS loan payment of more than \$550,000.⁵⁷

C. Without A Waiver, The Adak Community’s Vital Anchor Institutions Will Lose Access To Voice And Broadband Services.

AEE provides essential connectivity for Adak’s anchor institutions. Without AEE’s services, Adak’s school, library, utility, and medical facility will lose voice and broadband access.

Adak’s school – the only institution providing educational services to Adak’s children – relies on AEE’s system to provide broadband access for its students and, only as a result of AEE’s fiber-to-the-home network, the school has been able to facilitate distance learning for all

⁵⁵ *Id.*

⁵⁶ The Commission offered “sharing administrative or operating functions with other carriers” as an example of a way to increase operational efficiencies. As noted in Section III(D) of this Petition, AEE already shares its staff with Windy City Wireless, its wireless affiliate. *See USF/ICC Transformation Order*, ¶ 292.

⁵⁷ *See* Information on Outstanding Loans at Exhibit 9. AEE paid principal and interest of \$555,488.54 in 20120 and \$558,746.16 in 2011.

of its students. Distance learning is particularly important in Adak where students frequently cannot physically travel to school during harsh weather conditions.

Adak's utility company, TDX Adak, on which the community relies for electricity, also depends on AEE's system to perform vital operations. The utility company's office in Adak depends on AEE's broadband service to communicate with its headquarters, and the company's staff relies on the wireless service facilitated by AEE when performing essential maintenance operations in the field.

Moreover, AEE's network also facilitates both on-location and telemedicine programs provided by the Adak Community Health Center, Adak's only medical facility. If AEE were unable to continue providing service to these vital institutions, the consequences to these institutions – and the Adak community as a whole – would be devastating. For example, Eastern Aleutian Tribes, the non-profit tribal health organization that provides health services to residents of the Adak area, would be unable to provide healthcare:

Eastern Aleutian tribes would have an immediate impact should [AEE be forced out of business]. It would be impossible for us to continue to provide healthcare service which we currently allow in the community without critical telephone and cellular infrastructure support. Because of the great distance between Adak Island and Anchorage, Alaska where the primary hospital our patients are seen, we utilize extensively TeleVideo and telephonic communication tools. Without these tools, critical communication between physicians, the hospital, and our clinic would be severed and we would be forced to go to a much more expensive satellite telecommunication process which would raise costs to the point of creating such a disparity that we would be forced to close the clinic.⁵⁸

Absent a waiver, the vital anchor institutions serving the Adak area will be deprived of all voice and broadband services, a result that is directly contrary to the Commission's universal service goal of "ensur[ing] universal availability of modern networks capable of providing voice

⁵⁸ Letter from Eastern Aleutian Tribes, dated April 26, 2012, at Attachment A.

and broadband service to homes, business, and community anchor institutions.”⁵⁹ The Bureau should grant a waiver to avoid this result.

D. Without The Waiver, Critical Services, Government Functions And Public Safety Will Be Jeopardized.

AEE is the only provider of wireline services necessary for critical infrastructure, government functions and public safety in the Adak area.⁶⁰ Without AEE, public safety institutions throughout Adak will be unable to function as they do today. For example, the Adak community is served by only one law enforcement officer and a single voluntary fire department, both of which rely on AEE’s system for communications. AEE’s network also provides essential support for air traffic monitoring systems, which monitor airplanes flying or landing in the Adak area. Further, Adak’s tsunami warning system, which provides life-saving emergency alert information in the event of a tsunami, is routed through AEE’s network, and crews expected to arrive in the Adak area to clean up debris from the 2011 Japanese tsunami will depend on AEE’s wireline and Windy City Cellular’s wireless systems to communicate.

Letters from the U.S. Department of the Interior and several local entities, including The Marine Exchange, The Aleut Corporation, and the City of Adak, demonstrate the vital role that AEE plays in keeping the Adak community safe.⁶¹ The U.S. Department of the Interior describes the need for comprehensive wireline, broadband and wireless service this way:

[The Department of the Interior] maintain[s] a critical forward operating base in Adak including multiple buildings, housing, supplies, communications equipment, and one year-round staff member plus many employees intermittently working out of Adak . . . Adak serves as our hub for all work in the Aleutians involving hundreds of researchers, technicians and crew. Our lone employee

⁵⁹ *USF/ICC Transformation Order*, ¶ 17.

⁶⁰ *See* Information Regarding Lack of Alternative Providers at Exhibit 2.

⁶¹ *See* Letters of Support at Attachment A.

stationed continuously at Adak serves as our safety coordinator for field operations across the refuge, along with performing many other functions. All of our remote field camps perform mandatory safety checks through our Adak office. Field camps receive weather forecasts, tsunami warnings, and volcano warnings through Adak. Field camps file float plans to Adak for all small boat operations, including reports of their safe return following the boating operation. Having telephone service, cell phone service, and internet service available on Adak is of extreme value to the refuge. The communications allowed by these technologies allow our ship and field camps to operate safely and effectively in this remote area, plus allow coordination in our Homer office.⁶²

Moreover, as explained by The Aleut Corporation, an Alaska Native Regional Corporation whose shareholders are primarily of Aleut descent, without a waiver the entire Adak area will be in jeopardy:

Without a waiver, the consequences of the FCC Order on AEE and WCC will be felt by nearly the entire island of Adak, including TAC [The Aleut Corporation] and its subsidiaries [which provide fuel to the area], and critical government entities including the U.S. Fish and Wildlife Service, The City of Adak, the Marine Exchange (which is responsible for monitoring fishing vessels in the Bering Sea and the Pacific Ocean), the USGS Albuquerque Seismological Laboratory, and the Alaska Volcano Observatory, as well as government contractors, tourists, hunters and fisherman. The overall safety, growth and economic development of this remote island will be jeopardized.⁶³

The Marine Exchange of Alaska and Captain Edward E. Page of the U.S. Coast Guard (Retired), offers an additional helpful perspective on the critical nature of AEE's services and broadband connectivity for maritime safety:

The Marine Exchange of Alaska . . . has developed a comprehensive vessel tracking network throughout Alaska to aid safe, secure, efficient and environmentally sound maritime operations. One of our most important vessel tracking AIS (Automatic Identification System) receiving sites in Alaska is located in Adak on the White Alice location. This tracking system is relied on by the Coast Guard, State of Alaska and the maritime community to aid maritime safety and emergency response. The operation of this vessel tracking . . . is very dependent on the power and internet connectivity that AEE and Windy City

⁶² Letter from the United States Department of the Interior, Fish and Wildlife Service at Attachment A.

⁶³ TAC Letter at Attachment A.

provide. If the FCC Transformation Order is not reversed for Adak, the future of this vessel tracking system is in jeopardy as is the future of the community itself which certainly is not in the best interests of our country.⁶⁴

Finally, the City of Adak also expressed its need for AEE's switching and routing capabilities and expertise with respect to an E-911 system for the Adak area:

With the recent arrival of Icicle Seafoods in the community, as well as recognizing other opportunities that have begun to materialize on Adak Island, the City has acknowledged that its 911 system needs to be severely improved. The City currently relies on the AEE network to provide switching and routing capabilities to Public Safety staff in order to provide emergency services.⁶⁵

In addition to the foregoing, AEE and its affiliates also provide wireline service, broadband, and roaming access to the Alaska Volcano Observatory (AVO), which is a joint program of the USGS, the Geophysical Institute of the University of Alaska Fairbanks (UAFGI), and the State of Alaska Division of Geological and Geophysical Surveys (ADGGS). AVO uses federal, state, and university resources to monitor and study Alaska's hazardous volcanoes, to predict and record eruptive activity, and to mitigate volcanic hazards to life and property by providing timely and accurate information on volcanic hazards, and warnings of impending dangerous activity, to local, state, and federal officials and the public.

If AEE is not granted the waiver, the consequences for the foregoing critical services, governmental entities and public safety resources in the Adak area will be devastating.⁶⁶ In the harsh climate of Adak Island, the connection to emergency services can be the difference between life and death. The wireless carrier systems, particularly Windy City Cellular, which provides service throughout the Adak area, including maritime locations and the Aleutian

⁶⁴ Marine Exchange of Alaska Letter at Attachment A.

⁶⁵ City of Adak Letter at Attachment A.

⁶⁶ *See id.*

Wilderness, interconnect with and rely on AEE and are the underpinning for important public safety functions, research endeavors, jobs, and day-to-day living for the Adak area. In order to preserve public safety throughout the Adak area, good cause exists for the Bureau to grant this waiver request.

E. Without The Waiver, AEE Will Become Insolvent, Causing Jobs To Be Lost And The Fragile Adak Economy To Suffer.

There can be no economy on Adak Island without AEE. AEE currently provides vital connectivity for all businesses operating in the Adak area. These businesses include Alaska Airways and TAC's fueling port and crew transfer facility, which provide support for foreign fishing fleets. Moreover, the majority of AEE's customers are small businesses, including several companies with multiple phone lines. These small businesses, which are currently stimulating the economy and job growth in the Adak community, will be without access to voice and broadband service if AEE must shut down operations. Without such access, it is difficult to imagine how these businesses will continue to operate from the remote Adak area. Icicle Seafoods, Inc., one of the primary employers in the Adak area, explains in its letter of support why the broadband services provided by AEE infrastructure and wireless communications are essential for its business operations on the island:

We are all too aware of the extreme high costs associated with doing business in Adak and believe that Federal USF support is essential to the telecommunications infrastructure in Adak. In the past 3-5 years the fishing regulatory agencies have instituted and require electronic reporting regulations, we communicate through e-mail with our fishing vessels, have an inter-plant cellular system, etc. In this day and age, it would be impossible to conduct business without a viable communication system.⁶⁷

⁶⁷ Letter from Icicle Seafoods, Inc., dated April 25, 2012, at Attachment A.

The Adak Community Development Corporation further describes how the Adak community and, in particular, the fishing industry depends on the communications services provided by AEE:

[AEE] now provides Adak Island the modern communications services it needs in order to survive and thrive . . . The fishing industry relies on the telecommunications services provided by AEE and [Windy City Cellular]. At the most basic level in the seafood business, because of the federal government's mandatory requirements for electronic reporting, the local fish processing plant can't even legally operate without internet access.⁶⁸

As the Alaska Congressional Delegation warned in its letter to the Commission, the risk of losing the communications services facilitated by AEE – including the wireless services provided by Windy City Cellular – poses a threat to not only the Adak economy but also an integral part of the U.S. seafood industry:

Adak is arguably the most remote community in the United States. Therefore, as you can imagine, Adak's dependence on telecommunications is enormous. The risk of losing wireless telecommunications services presents a crisis and jeopardizes an integral part of an industry that supplies the United States with fifty percent of its seafood.⁶⁹

Furthermore, because AEE and Windy City Cellular each rely on the same small staff which is shared between the companies, if AEE is not granted a waiver, it will have no choice but to continue gradually laying off its workforce. As the City of Adak noted in its letter of support:

We expect that [AEE and Windy City Cellular] would collectively be driven into bankruptcy within 12 months, impacting the Rural Utilities Service ("RUS") fund by forcing default on loans extended to AEE. Furthermore, at least six (6) people on Adak Island, compris[ed] of highly skilled individuals, will be terminated

⁶⁸ Letter from Adak Community Development Corporation, dated April 20, 2012, at Attachment A.

⁶⁹ Letter from the Alaska Congressional Delegation, dated April 20, 2012, at Attachment A.

which will result in a significant hit to the local economy. This community can ill afford another setback to community development and sustainability.⁷⁰

Because AEE and Windy City Cellular share employees, the staffing cuts in one entity affect the other. Earlier this year, AEE was forced to lay off two employees because of the unexpected, drastic cut in funding.⁷¹ As part of its exit plan in the absence of a waiver, AEE was forced to release two more positions on May 3. Taken together, AEE (and therefore Windy City Cellular) has lost approximately one-fourth of its workforce as a direct consequence of the Commission's reforms. Not only are these jobs important to the economy of Adak, but these positions are crucial to respond to service outages, provide technical support, and handle consumer needs for AEE, Windy City Cellular and Alaska Wireless.

Clearly the services provided by AEE are essential to maintain jobs that are beneficial to the Adak area and our entire nation. A waiver to keep AEE in business is more than justified.

IV. GRANTING THE WAIVER IS NECESSARY TO ENSURE THAT CONSTITUTIONAL, STATUTORY, AND FAIRNESS PRINCIPLES ARE NOT VIOLATED.

The Commission created an expedited waiver program to address situations where “specific proposals have a disproportionate or inequitable impact on any carriers (wireline or wireless) serving Alaska.”⁷² There is no doubt that implementation of the \$250 monthly cap beginning in July will have a disproportionate and inequitable impact on AEE and the Adak community. The only way to avoid this impact is for the Bureau to grant this waiver. Granting

⁷⁰ See City of Adak letter at Attachment A.

⁷¹ See generally WCC Petition.

⁷² *USF/ICC Transformation Order*, ¶ 508 (emphasis added).

AEE's waiver request is also necessary to ensure that the APA, the Fifth Amendment, and principles of fairness are not violated.

A. As Applied To AEE, The \$250 Monthly Cap Is Unconstitutional As A Confiscatory Regulation.

Absent a waiver, application of the \$250 monthly cap to AEE will threaten the company's "financial integrity" and "destroy the value" of its property, thus representing an unconstitutional confiscatory regulation.⁷³ As demonstrated by this Petition, the Commission has effectively precluded AEE from recovering the investment it has made in building out an expensive communications network in an extremely high cost area. By so drastically reducing the revenue base of AEE, knowing that the shortfall cannot be addressed through other reasonable means, the Commission will deprive AEE of the ability to recover the minimum costs it needs to remain operational. Without the requested waiver, AEE will become insolvent, forcing it to discontinue all service, default on its RUS loans, and abandon all of its substantial investments, facilities, and other property.

In examining whether a regulation is confiscatory, the "guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."⁷⁴ A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired" that it "practically deprive[s] the owner of property without due process of law."⁷⁵ Courts have

⁷³ *Id.*, ¶ 294, citing *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993)(examining whether an FCC rate policy "threatens the financial integrity" of regulated entities "or otherwise impedes their ability to attract capital" when deciding if a regulation is confiscatory).

⁷⁴ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

⁷⁵ *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, 164 U. S. 597 (1896).

consistently held that if government-regulated rates are so low that they make it impossible for a business to continue to recover costs and remain operational, the rates are constitutionally confiscatory.⁷⁶ It is also well-established that “[i]t is not theory, but the impact of the rate order, which counts.”⁷⁷

Here, the impact of the \$250 monthly cap on AEE, even if phased-in, is confiscatory because the Commission knowingly adopted a regulatory regime in which customer rates can never be raised high enough for AEE to recover the costs needed to remain in operation. AEE will only be able to charge consumers rates that are lower than the fixed high costs of operating in Adak. USF support comprises 90% of AEE’s revenue base. Implementation of the cap ultimately will result in AEE’s support decreasing by approximately 83%.⁷⁸ Given that AEE is already operating at a loss, such a substantial percentage decrease cannot reasonably be expected to be substituted with prohibitively high customer rates. Each customer would have to pay approximately \$2,698 each month, over 6,000% more than the current rate, just to cover AEE’s operating expenses.⁷⁹ As a result, the Commission’s reforms will create a large gap between how much revenue AEE can generate and how much is needed to cover minimum operating expenses until other funding becomes available. AEE will have no viable method to recover its

⁷⁶ See, e.g., *FPC v. Hope Natural Gas*, 320 U.S. 591, 603 (1944)(“it is important that there be enough revenue not only for operating expenses, but also for the capital costs of the business.”).

⁷⁷ See, e.g., *id.* at 601.

⁷⁸ See Financial and Operating Forecast at Exhibit 8.

⁷⁹ As reflected in Exhibit 5, each customer currently pays \$40.60 per month for a residential line. Under the \$250 cap, each customer would have to pay approximately \$2,658 more per month to cover AEE’s operating expenses.

costs, repay its loan obligations, and obtain a return on its investments. Accordingly, the caps threaten AEE's "financial integrity" and will "destroy the value" of its property.⁸⁰

Furthermore, AEE entered into its loan agreements with RUS and undertook a massive commitment to bring modern telecommunications access, both voice and broadband, to one of the most remote areas of the entire country. This commitment was specifically premised on its, and RUS's, reasonable expectation that it would continue to receive USF support for repayment. AEE has spent the past several years investing in and building out facilities in Adak, costly expenditures made possible only because the Commission granted AEE accelerated USF support in the first place.

In 2005, when the Commission waived its rules allowing AEE to receive immediate USF funding, its decision was based on the Commission's specific finding that any delay in AEE's high-cost support "would impair its ability to provide telecommunications services at affordable rates."⁸¹ Because nothing has changed that would allow AEE to now provide services in Adak "at affordable rates" without substantial USF support, it is reasonable to expect the Commission would continue to provide USF support at levels adequate for services to continue. This reasonable expectation is reinforced by the numerous established policies that mandate and encourage national access to affordable voice and broadband services:

- "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to

⁸⁰ See *USF/ICC Transformation Order*, ¶ 294, citing *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993) and *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

⁸¹ See December 29, 2005 *Order*, ¶ 10 at Exhibit 11.

those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”⁸²

- “Access to advanced telecommunications and information services should be provided in all regions of the Nation.”⁸³
- “Quality services should be available at just, reasonable, and affordable rates.”⁸⁴
- “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”⁸⁵
- “Given the important benefits of and the strong consumer demand for mobile services, ubiquitous mobile coverage must be a national priority.”⁸⁶
- “One of the Commission’s central missions is to make ‘available ... to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.’”⁸⁷
- “Fixed and mobile broadband have become crucial to our nation’s economic growth, global competitiveness, and civic life. Businesses need broadband to attract customers and employees, job-seekers need broadband to find jobs and training, and children need broadband to get a world-class education.”⁸⁸
- “The objective [of USF reform] should be to maximize the number of households that are served by broadband meeting the National Broadband Availability Target.”⁸⁹
- “The goal of the [1996] statute, and the standard against which we measure our progress, is universal broadband availability.”⁹⁰

⁸² 47 U.S.C. § 254(c).

⁸³ *Id.* at § 254(b)(2).

⁸⁴ *Id.* at § 254(b)(1).

⁸⁵ *Id.* at § 254(b)(5).

⁸⁶ *USF/ICC Transformation Order*, ¶ 295.

⁸⁷ 47 U.S.C. § 151.

⁸⁸ *USF/ICC Transformation Order*, ¶ 3.

⁸⁹ National Broadband Plan at 143.

⁹⁰ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*; A National Broadband Plan for Our Future, GN Docket Nos. 09-51, 09-137, Sixth Broadband Deployment Report, FCC 10-129, ¶ 29 (2010)

Now, however, the reforms in the Order not only “interfere” with AEE’s reasonable “investment-backed expectations”⁹¹ based on its initial USF waiver and general Commission and statutory policy positions on USF support, but will cause AEE to completely discontinue all service, foregoing all of its property and other investments before its costs could be recovered, in violation of constitutional property principles.

However, recognizing that there may be a situation where the reduction in USF support could result in constitutionally confiscatory rates, the Commission stated in the Order that it would consider waiver requests for additional support to avoid such an outcome.⁹² In light of the above, AEE respectfully requests that the Bureau grant this waiver to ensure AEE does not suffer an unconstitutional confiscatory taking of property.

B. By Failing To Consider Relevant Factors During Its Rulemaking, The Commission Will Act In An Arbitrary And Capricious Manner If It Imposes The \$250 Monthly Cap On AEE.

Because the Commission failed to consider key factors regarding the detrimental impact the \$250 monthly cap will have on uniquely situated remote carriers such as AEE, the Commission’s application of the cap to AEE would be arbitrary and capricious. It is a longstanding tenet of administrative law that an agency must consider all the “relevant factors” when taking action to avoid a court finding that it has acted in a manner that is “arbitrary and capricious,” under Section 706(2)(A) of the APA.⁹³

⁹¹ See *Penn Central v. New York City*, 438 U.S. 104, 124 (1978).

⁹² See *USF/ICC Transformation Order*, ¶ 294.

⁹³ 5 U.S.C. § 706(2)(A). For example, in the seminal *Citizens to Preserve Overton Park v. Volpe* case, 401 U.S. 402, 416 (1971), the Supreme Court held that in addition to examining an agency’s statutory authority, a reviewing court must consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Further, in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), the Court held that

Here, the Commission undoubtedly invested significant time and resources in developing the \$250 monthly cap. However, for the reasons described above, it is unfathomable that it was the Commission's intent to put carriers such as AEE that serve remote, high-cost areas in Alaska out of business (*see* Section II herein) or to create new unserved areas. Under these circumstances, it is reasonable to conclude that the Commission simply did not take into account or was not aware of certain relevant factors, specifically the facts and circumstances leading to the extreme and immediate impact on unique carriers, such as AEE, when developing the caps.

Accordingly, the Commission's apparent failure to consider all the relevant factors when setting the caps means that the Commission's action may be deemed arbitrary and capricious under Section 706(2)(A) of the APA. Grant of a waiver by the Bureau will address the unique situation presented by Adak and avoid a potentially time-consuming and costly remand process.

C. As Applied To AEE, The \$250 Monthly Cap Violates Principles Of Due Process And Fairness.

As courts have explained, adequate notice and a meaningful opportunity for parties to challenge the manner in which a federal agency implements its rules are essential elements of due process.⁹⁴ Here, implementation of the \$250 monthly cap just *six months* after the *USF/ICC Transformation Order* was released, violates these essential elements of due process and fundamental fairness.

an agency action should typically be remanded if the "agency has not considered all relevant factors."

⁹⁴ *See, e.g., Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997) ("Notice and a meaningful opportunity to challenge the agency's decision are the essential elements of due process.").

Although the Commission's *NPRM* sought public comment on the proposal to implement a \$3,000 per line annual cap,⁹⁵ the *NPRM* did not adequately notify AEE that the cap might be applied in just six months time, forcing AEE to lay off employees even before the cap goes into effect and begin planning for shut down of operations.⁹⁶ Indeed, in discussing a proposed \$3,000 per line annual cap, the Commission's *NPRM* specifically recognized that the cost of providing terrestrial service "in some rural areas is significant and ... affirm[ed] that universal service must truly be universal."⁹⁷ Further, the Commission noted in its *NPRM* that "[w]e recognize that there may be unique circumstances in very high-cost areas justifying higher levels of support."⁹⁸ To this end, the *NPRM* expressly contemplated carving out an exception for remote carriers, such as AEE, who serve Tribal lands or operate outside the continental U.S.⁹⁹ Given the *NPRM*'s recognition that higher costs can be justified by the unique factors faced by remote carriers – as well as the Commission's contemplation of a specific exemption that would apply to carriers such as AEE – AEE could not have reasonably predicted that the Commission would completely ignore the considerations contemplated in its *NPRM* and instead begin implementation of a cap that will drive AEE out of business by the end of 2013.

⁹⁵ See *Connect America Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, WC Docket No. 10-90 et al., ¶¶ 208-215 (rel. February 9, 2011) ("*NPRM*").

⁹⁶ See Section II of the Petition, *supra*, explaining that AEE already has been forced to lay off four employees, and by July, if the reforms for which waiver is sought are implemented against AEE, AEE will need to begin business-shutdown planning with cessation of operations in 12-24 months.

⁹⁷ *NPRM*, ¶ 210.

⁹⁸ *Id.*

⁹⁹ *Id.* at ¶ 211 (contemplating an exception for carriers serving Tribal lands in addition to carriers operating outside the continental United States).

Absent a waiver, the Commission's catastrophic change in the rules, without adequate notice or opportunity to plan for the change, is patently unfair, especially for a small organization of limited resources that is serving a remote Alaska community. Indeed, there is likely no amount of planning that can aid AEE in surviving the new HCLS cap. As described above, AEE has relied on the rules that the federal government put in place, has lived up to both the letter and the spirit of those rules by building and providing communications service as required by the RCA and the FCC, and met all of its obligations under the pertinent federal and state regulations. Significantly, RUS conditioned its loan approval on AEE's ability to secure immediate funding under existing USF rules.¹⁰⁰ As already discussed, AEE utilized this funding to build a network to provide vital services to the Adak community. Absent a waiver, however, the Commission's implementation of the \$250 monthly cap will make it impossible for AEE to meet its payment obligations under the loan. Indeed, had AEE known at the time that the Commission would subsequently impose rules that would force the company to default on its RUS loan payment, AEE would not have entered the agreement in the first place – and would not have undertaken providing service to an unserved remote area.

AEE and its customers on a remote Alaskan island now stand at the brink of disaster. With forethought and wisdom, the Commission anticipated such extreme circumstances and provided for a fair and expedient resolution through individual waivers.¹⁰¹ AEE's dire situation is just the type anticipated by the Commission. Granting AEE's request for a waiver will avoid an unfair and inequitable result – the stated intent and purpose for such waivers.

¹⁰⁰ See RUS Loan Schedule I at Exhibit 11.

¹⁰¹ See *USF/ICC Transformation Order*, ¶ 539.

V. REQUESTED RELIEF.

Waiver of implementation of the \$250 monthly cap is justified in this case because, as the *USF/ICC Transformation Order* provides, AEE “can demonstrate that the reduction in existing high-cost support would put consumers at risk of losing voice service, with no alternative terrestrial providers available to provide voice telephony.”¹⁰² Without question, imposition of the cap will not just put consumers “at risk” of losing service, but will actually shut down services, creating a new unserved area and eliminating broadband and roaming access. Moreover, AEE has demonstrated that the reduction in high-cost support would cause it to default on its existing RUS loan.¹⁰³

In order to avoid these results, AEE requests a waiver of implementation of the \$250 monthly cap. In order to be consistent with the delayed transition plan for remote Alaska CETCs,¹⁰⁴ the Bureau should grant, at a minimum, a two-year delay in the implementation of the \$250 HCLS cap, allowing AEE, and as a result Windy City Cellular, to remain operational. Although the Commission declined to grant a blanket delay for all incumbent carriers serving remote areas of Alaska,¹⁰⁵ given that any reduction in funding will force AEE to discontinue service to the Adak area, a minimum two-year delay for AEE is necessary to serve the public interest. However, as noted throughout, AEE already operates at a loss and will be unable to sustain service to the Adak area unless USF support remains roughly constant now, and in the future. AEE understands that if it is granted a waiver, it will be required to periodically re-

¹⁰² *Id.*, ¶ 32.

¹⁰³ *Id.*, ¶ 540.

¹⁰⁴ *Id.*, ¶ 529.

¹⁰⁵ *Third Order on Reconsideration*, ¶ 42.

validate its need for support above the HCLS cap.¹⁰⁶ AEE is confident that it will be able to show a continuing need for support that is roughly equal to the support it receives today.

The Commission created an expedited waiver program to address AEE's particular situation in which a specific reform has "a disproportionate or inequitable impact" on a carrier serving Alaska."¹⁰⁷ Not only should the Bureau grant this Petition expeditiously, before July 1, 2012, but it also should forestall application of the HCLS cap to AEE until this Petition is decided. Given that AEE is already operating at a loss, it is urgent for the Bureau to address this waiver request expeditiously.

VI. CONCLUSION.

AEE does not believe the Commission intended the devastating consequences that will follow implementation of the HCLS cap for the Adak area. In order to forestall AEE from taking additional actions to reduce staff and make additional cuts to the network that are already negatively impacting AEE and Windy City Cellular services, AEE respectfully requests that the Bureau act expeditiously on this waiver request. If the Bureau does not act by July 1, 2012, to either grant this Petition or forestall implementation of the HCLS cap to AEE, AEE's HCLS support will immediately decline by approximately 34% beginning July 1, 2012. AEE is already operating at a loss, and there is no amount of cost-cutting that can bring AEE's costs in line with the revenue reductions mandated by the Commission.

As this Petition makes clear, waiver of implementation of the \$250 monthly cap is justified for many reasons, not the least of which are two justifications advanced by the Commission in the *USF/ICC Transformation Order*: (1) Without a waiver, implementation of

¹⁰⁶ *USF/ICC Transformation Order*, ¶ 278.

¹⁰⁷ *Id.*, ¶ 508.

the HCLS cap will cause AEE to shut down service (to residents, businesses, governmental entities, and others carriers); and (2) the HCLS reform will cause AEE to default on its existing RUS loans and become insolvent. Moreover, as described herein and in the numerous letters in support of this waiver request, AEE service is critical to anchor institutions in Adak (the school, the healthcare system, the utility), government functions, local and national public safety operations that take place throughout the Adak area, including maritime locations and in the Aleutian wilderness, and the fishing industry, which is vital not just to the Adak area, but to our entire nation.

For all the reasons discussed in this Petition, the Bureau should grant a minimum two-year delay in implementation of the \$250 HCLS cap. However, even in two years it is unlikely that AEE will be able to continue providing service to the Adak area unless USF support levels remain roughly constant. If this Petition is granted, AEE will periodically re-validate its need for support above the HCLS cap to the Bureau.

Respectfully submitted,



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